Muhammad Zulkarnain bin Mohamed Rokani (a child suing through his representative, Mohamed Rokani bin Mokmin) & Ors v Pengarah Hospital Sultan Ismail Johor Bahru & Ors

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-21NCVC-13–04 OF 2019
EVROL MARIETTE PETERS JC
1 SEPTEMBER 2020

Evidence — Expert witness — Whether the witness called by both the plaintiffs and defendant were 'person specially skilled' — Whether the court had descended into the arena of the dispute by putting questions to the witness — Evidence Act 1950 ss 45, 51 & 165

Tort — Negligence — Medical negligence — Whether first plaintiff's conduct in riding without licence was relevant

Tort — Assessment — Aggravated damages — Claim for pain and suffering, and loss of amenities — Cost of the prosthesis — Claim for cost of care/house-help — Claim for cost of proceedings — Cost of court attendance of expert witness — Cost of other items — Defendant conceded liability — General damages — Whether art 8 of the Federal Constitution was applicable — Federal Constitution art 8

This was the plaintiffs' claim against the defendant based on medical negligence when the first plaintiff sought treatment for his right leg. The second and third plaintiffs were parents of the first plaintiff. The first and 12th defendants are the director generals respectively of two public hospitals and, except for the 19th defendant who was the Government of Malaysia, the remaining defendants are employed at the two public hospitals. The defendant has, during the trial conceded liability, and as a result thereof, the claim was withdrawn against the first to 18th defendants. The trial, however, proceeded on the assessment of damages only against the 19th defendant. On 23 July 2018, the first plaintiff, aged 12 years five months at the material time, fell whilst riding (without a valid licence) a motorcycle. He admitted that the accident was due to his own fault. After the accident, he was sent to the Kota Tinggi Hospital and was diagnosed for 'closed fracture distal end right femur'. On 24 July 2018, he was referred to Hospital Sultan Ismail Johor Bahru ('the first public hospital'), and on the evening of that day, he underwent closed manual reduction followed by an open reduction with k-wiring for distal femur

fracture. Complication subsequently developed, and on 29 July 2018, at Hospital Sultanah Aminah Johor Bahru ('the second public hospital'), the first plaintiff underwent an emergency fasciotomy on his right leg. Two amputations were then performed — the first was 'below knee amputation' on 30 July 2018, and the second was 'above knee amputation' on 12 August 2018. On 19 August 2018, the first plaintiff was discharged.

Held:

(1) The issue of liability was irrelevant and such contributory negligence, if at all, had no bearing on the assessment of damages. Secondly, it was undisputed that it was the defendant's negligence, and not the first plaintiff's fall from his motorcycle, that had caused both amputations, an event which had no proximity or causal connection to the first plaintiff's illegal act of riding the motorcycle without a licence. The court in its final analysis was of the view that the maxim *ex turpi causa non oritur actio* (no action can be based on a disreputable cause), which the defendant had relied on, did not apply to the assessment of damages in this case, it was also the court's opinion that whatever award granted to the plaintiff must be reasonable and not excessive (see paras 11–12 & 14).

(2) The plaintiffs' claim for pain and suffering, and loss of amenities was for a total sum of RM190,000. Although in principle an amount must be assessed for loss of the first plaintiff use of his limb, in reality, no sum can ever be adequate to compensate a person for the intangible loss of his limb, particularly so in this case where the first plaintiff was just over 12 years old when he had undergone the amputation. The court was of the view that an award of the sum claimed was, therefore, reasonable and just (see paras 15, 17 & 21).

(3) In the final analysis, although the court took cognisance of the injured feelings of the first plaintiff, after perusing the notes of the evidence, the court found that the conduct of the defendant which supposedly caused the injured feelings of the first plaintiff was not such as to warrant the award of RM1m for aggravated damages. It was in the court's finding that the plaintiffs had been informed of the surgeries to be performed on the first plaintiff, and the risks that ensued (see para 27).

(4) It was for the trial judge himself as both decider of fact and law to determine the weight to be attached to the evidence of the expert witness, regardless of his qualification or experience (or lack thereof). The court was more inclined towards the evidence of SP5 due to the details and based that he had furnished in his report (grounds), as required by s 51 of the Evidence Act (see paras 35–36).

(5) The court was reminded to be vigilant when expert witnesses gave evidence, and where one party, for example, failed to put relevant

questions, the answers thereto which would help the court arrived at a correct conclusion with regard to the matters relevant to the proceedings, the court had a duty to see that the particulars are elicited. The trial judge had the duty and right to put such questions to the witness, not with a view to help one side or the other, but to assist the court to reach a correct and just conclusion, with regard to the matters in dispute. In that sense, the court must remain vigilant so as not to invite, condone and engender abuse in the way of manipulating of claims, which is not what damages are for (see paras 47 & 50).

(6) The court was of the view that the plaintiff's reliance on art 8 of the Federal Constitution was misconceived. The court had already alluded to the fact that the plaintiffs were not discriminated on the basis of their financial situation. The court must strike a balance between what was reasonably suitable for the first plaintiff, without rendering the defendant impecunious (see paras 54 & 59).

(7) The plaintiffs were awarded a monthly sum of RM500 for cost of care/house-help, which in the court's view was reasonable, fair and in accordance with other comparable cases. The trial had proceeded for five days (although not full days), and although the defendants had conceded to liability, they had done so midway during the trial. The court, therefore, took that view that RM70,000 was fair and reasonable figure for the cost of proceedings. The court awarded the amount of RM4,000 to the attendance of expert witness, Dr Dhillon and RM2,500 for Ryaliratna Manjari ('SP6') (see paras 63–64 & 68–69).

[Bahasa Malaysia summary

Ini adalah tuntutan plaintif terhadap defendan berdasarkan kecuaian perubatan apabila plaintif pertama mendapat rawatan untuk kaki kanannya. Plaintif kedua dan ketiga adalah ibu bapa plaintif pertama. Defendan pertama dan ke-12 masing-masing adalah ketua pengarah kedua-dua hospital awam dan, kecuali defendan ke-19 yang merupakan Kerajaan Malaysia, defendan yang selebihnya bekerja di dua buah hospital awam tersebut. Defendan telah, semasa perbicaraan mengakui liabiliti, dan akibatnya, tuntutan tersebut ditarik balik terhadap defendan pertama hingga ke-18. Namun, perbicaraan diteruskan dengan penaksiran ganti rugi hanya terhadap defendan ke-19. Pada 23 Julai 2018, plaintif pertama, yang berumur 12 tahun lima bulan pada masa yang material, terjatuh apabila menunggang (tanpa lesen yang sah) motosikal. Beliau mengakui bahawa kemalangan tersebut disebabkan oleh kesalahannya sendiri. Selepas kemalangan tersebut, beliau telah dihantar ke Hospital Kota Tinggi dan didiagnosis sebagai 'closed fracture distal end right femur'. Pada 24 Julai 2018, beliau dirujuk ke Hospital Sultan Ismail Johor Bahru ('hospital awam pertama'), dan pada petang hari tersebut, beliau menjalani 'closed manual reduction' diikuti dengan 'open reduction' dengan 'k-wiring' untuk patah tulang paha. Komplikasi kemudiannya terjadi, dan pada 29 Julai 2018,

di Hospital Sultanah Aminah Johor Bahru ('hospital awam kedua'), plaintif pertama menjalani fasiotomi kecemasan pada kaki kanannya. Dua amputasi kemudiannya dijalankan — yang pertama adalah 'amputasi lutut bawah' pada 30 Julai 2018, dan yang kedua adalah 'amputasi lutut atas' pada 12 Ogos 2018. Pada 19 Ogos 2018, plaintif pertama telah didiscaj.

Diputuskan:

(1) Isu liabiliti adalah tidak relevan dan kecuaian tersebut, jika tidak, sama sekali tidak berkaitan dengan penaksiran ganti rugi. Kedua, ianya tidak dipertikaikan bahawa ianya adalah kecuaian defendan, dan bukanlah disebabkan plaintif pertama yang jatuh dari motosikalnya, yang telah menyebabkan kedua-dua amputasi, suatu peristiwa yang tidak berkaitan atau tiada hubungan penyebab kepada tindakan tidak menurut undang-undang oleh plaintif yang menunggang motosikal tanpa lesen. Mahkamah dalam analisis terakhir berpendapat bahawa maksim *ex turpi causa non oritur actio* (tidak ada tindakan yang dapat didasarkan kepada sebab yang tidak dapat dipertikaikan), yang telah disandarkan oleh defendan, tidak terpakai untuk penaksiran ganti rugi dalam kes ini, ia juga adaah pendapat mahkamah bahawa apa pun award yang diberikan kepada plaintif mestilah wajar dan tidak berlebihan (lihat perenggan 11–12 & 14).

(2) Tuntutan plaintif untuk kesakitan dan penderitaan, dan kehilangan kemudahan adalah berjumlah RM190,000. Walaupun pada prinsipnya jumlah tersebut mesti ditaksirkan untuk kehilangan penggunaan anggota badan oleh plaintif pertama, pada hakikatnya, tidak ada jumlah yang mencukupi untuk memberi ganti rugi kepada seseorang atas kehilangan anggota badannya, terutama dalam hal semasa apabila plaintif berumur lebih dari 12 tahun ketika beliau menjalani amputasi. Mahkamah berpendapat bahawa pemberian jumlah award tersebut, oleh itu, wajar dan adil (lihat perenggan 15, 17 & 21).

(3) Dalam analisis terakhir, walaupun mahkamah mengambil kira kecederaan perasaan plaintif pertama, setelah meneliti nota keterangan, mahkamah mendapati bahawa tindakan defendan yang kononnya menyebabkan kecederaan perasaan plaintif pertama tidak menjamin award RM1 juta untuk ganti rugi teruk. Ianya adalah dapatan mahkamah, plaintif telah dimaklumkan mengenai pembedahan yang akan dijalankan terhadap plaintif pertama, dan risiko yang akan timbul (lihat perenggan 27).

(4) Ianya adalah untuk hakim perbicaraan sendiri sebagai penentu fakta dan undang-undang untuk menentukan berat yang harus ditetapkan pada keterangan saksi pakar, tanpa mengira kelayakan atau pengalamannya (atau kekurangannya). Mahkamah lebih cenderung kepada keterangan SP5 kerana perincian dan asas yang telah beliau kemukakan dalam

laporannya (alasan), seperti yang dikehendaki oleh s 51 Akta Keterangan (lihat perenggan 35–36).

(5) Mahkamah diingatkan untuk lebih waspada apabila saksi pakar memberikan keterangan, dan di mana satu pihak, misalnya, gagal mengemukakan soalan yang relevan, jawapannya yang akan membantu mahkamah mencapai kesimpulan yang tepat berkenaan dengan perkara relevan yang berkaitan dengan prosiding, mahkamah mempunyai kewajipan untuk melihat bahawa butir-butir tersebut dijelaskan. Hakim perbicaraan mempunyai tanggungjawab dan hak untuk mengajukan pertanyaan sedemikian kepada saksi, bukan dengan tujuan untuk membantu satu pihak atau yang lain, tetapi untuk membantu mahkamah mencapai kesimpulan yang tepat dan adil, berkenaan dengan perkara yang dipertikaikan. Dalam hal itu, mahkamah harus tetap waspada agar tidak mengundang, menerima dan menimbulkan penyalahgunaan dengan cara memanipulasi tuntutan, yang bukan merupakan tujuan ganti rugi (lihat perenggan 47 & 50).

(6) Mahkamah berpendapat bahawa pergantungan plaintif pada perkara 8 Perlembagaan Persekutuan telah disalah anggap. Mahkamah telah pun memutuskan berdasarkan kepada fakta bahawa plaintif tidak didiskriminasi pada asas keadaan kewangan mereka. Mahkamah mesti mencari keseimbangan antara apa yang wajar bagi plaintif pertama, tanpa menyebabkan defendan kerugian (lihat perenggan 54 & 59).

(7) Plaintif diberikan award sejumlah RM500 setiap bulan untuk kos penjagaan/bantuan rumah, yang pada pandangan mahkamah adalah wajar, adil dan sesuai dengan kes-kes lain yang serupa. Perbicaraan telah berjalan selama lima hari (walaupun bukan sehari penuh), dan walaupun defendan telah mengakui liabiliti, mereka telah melakukannya pada pertengahan perbicaraan. Oleh itu, mahkamah berpendapat bahawa RM70,000 adalah angka yang adil dan munasabah untuk kos prosiding. Mahkamah memberikan award sejumlah RM4,000 untuk kehadiran saksi pakar, Dr Dhillon dan RM2,500 untuk Ryaliratna Manjari ('SP6') (lihat perenggan 63–64 & 68–69).]

Cases referred to

Abuchi Ngwoke v PP [2016] 2 MLJ 623, CA (refd)
Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241, CA (refd)
Antonina Marleen Yarendra v Chai Wei Chung [2017] 4 MLJ 359; [2017] 1 LNS 536, CA (refd)
Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors [2005] 3 MLJ 681; [2005] 2 CLJ 713, FC (refd)
Bonham-Carter v Hyde Park Hotel, Ltd [1948] 64 TLR 177, KBD (refd)
Cassell & Co Ltd v Broome [1972] AC 1027, HL (refd)

Chan Kwee Fong v PP [2010] 1 MLJ 441; [2010] 3 CLJ 671, CA (folld)
Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors [2019] 8 MLJ 331; [2019] 1 CLJ 626, HC (distd)
Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155; [1976] 1 LNS 19, FC (folld)
Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal [2018] 3 MLJ 281; [2018] 3 CLJ 427, FC (distd)
Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1; [2016]2 CLJ 885, FC (folld)
Joginder Singh a/l Ajaib Singh & Ors lwn Leong Sai Feng & Anor [2019] MLJU 1427; [2019] 1 LNS 1689, HC (distd)
Malaysian Bar v Government of Malaysia [1987] CLJ Rep 185, SC (refd)
Mohd Tarmizi Mat Hassan & Anor v Arief Fitri Ahmad Zainuddin [2014] 1 LNS 1005, HC (folld)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293; [2009] 6 CLJ 430, FC (refd)
PP v Khong Teng Khen & Anor [1976] 2 MLJ 166; [1976]1 LNS 100, FC (folld)
PP v Muhamed bin Sulaiman [1982] 2 MLJ 320, FC (refd)
PP v Saad bin Mat Takraw & Anor [1998] 3 MLJ 784; [1998] 3 CLJ 380, HC (folld)
Pyu Pyu Ma v Dr Lim Soo How & Ors [2019] 11 MLJ 628, HC (refd)
Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia [1970] 2 MLJ 151 (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337, HC (refd)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784; [2017] 1 LNS 500, CA (refd)
Sum Kum v Devaki Nair & Anor [1964] 1 MLJ 74; [1963] 1 LNS 131, FC (refd)
Tan Cheong Poh & Anor v Teoh Ah Keow [1995] 3 MLJ 89; [1996] 3 CLJ 665, CA (refd)
Teoh Suan Eng v Lew Meng Shin [1982] 2 MLJ 289 (folld)
Uthayakumar a/l M Subramaniam v Ang Teng Bee [2017] 8 MLJ 750; [2016] 1 LNS 1214, HC (refd)
Wong Chop Saow v PP [1965] 1 MLJ 247 (folld)
Wong Swee Chin v PP [1981] 1 MLJ 212; [1980] 1 LNS 138, FC (folld)
Yeo Kim Kuan v Hamid [1968] 2 MLJ 188; [1968] 1 LNS 177, FC (refd)

Legislation referred to

Evidence Act 1950 ss 45, 51, 165
Federal Constitution art 8

Road Transport Act 1987 s 26
Rules of Court 2012 O 40A r 2(1)

Haffirrudin Osman (Haffirrudin Osman & Co) for the plaintiffs.
Hj Jailani Hj Rahman (Azlan Borhan with him) (Senior Federal Counsel, State Legal Advisor) for the defendant.

Evrol Mariette Peters JC:

THIS CLAIM

[1] The second and third plaintiffs are parents of the first plaintiff. The first and 12th defendants are the Director Generals respectively of two public hospitals and, except for the 19th defendant who is the Government of Malaysia, the remaining defendants are employed at the two public hospitals.

[2] The plaintiffs' claim against the defendants was based on medical negligence when the first plaintiff had sought treatment for his right leg. The defendants had, during the trial conceded liability, and as a result thereof, the claim was withdrawn against the first to 18th defendants. The trial, however, proceeded on the assessment of damages only against the 19th defendant (referred to as 'the defendant' in this case).

THE BRIEF FACTS

[3] On 23 July 2018, the first plaintiff, who was aged 12 years five months at the material time, fell whilst riding (without a valid licence) a motorcycle. He admitted that the accident was due to his own fault.

[4] After the accident, he was sent to the Kota Tinggi Hospital and was diagnosed for 'closed fracture distal end right femur'. On 24 July 2018, he was referred to Hospital Sultan Ismail Johor Bahru, the first public hospital, and on the evening of that day, he underwent closed manual reduction followed by an open reduction with k-wiring for distal femur fracture.

[5] Complications subsequently developed, and on 29 July 2018, at Hospital Sultanah Aminah Johor Bahru, the second public hospital, the first plaintiff underwent an emergency fasciotomy on his right leg. Two amputations were then performed — the first was 'below knee amputation' on 30 July 2018, and the second was 'above knee amputation' on 12 August 2018. On 19 August 2018, the first plaintiff was discharged.

[6] The following were called as the plaintiffs' witnesses:

(a) Zaharah bt Johari, the first plaintiff's mother ('SP1');

(b) Mohamed Rokani bin Mokmin, the first plaintiff's father ('SP2');

(c) Md Zaid bin Basiran, the first plaintiff's brother ('SP3');

(d) Mohamed Zulkarnain bin Mohamed Rokani, the first plaintiff himself ('SP4');

(e) Choong Yuen Hui, a clinical prosthetist and orthotist ('SP5'); and

(f) Ryaliratna Manjari, a psychologist ('SP6').

[7] The defendant's sole witness was Dr Tan Jin Hui, a rehabilitation physician ('SD1').

[8] The plaintiffs' claim for assessment of damages was allowed in some aspects only, based on the following reasons.

CONTENTIONS, EVALUATION, AND FINDINGS

Whether the first plaintiff's conduct in riding without a licence was relevant

[9] The defendant argued that the fact that the first plaintiff was riding the motorcycle without a licence should be considered by this court in assessing damages, on the ground that the first plaintiff had committed an illegal act, pursuant to s 26 of the Road Transport Act 1987 ('the Road Transport Act'), which reads:

> Section 26 — Driving licences
>
> (1) Except as otherwise provided in this Act, no person shall drive a motor vehicle of any class or description, on a road unless he is the holder of a driving licence authorising him to drive a motor vehicle of that class or description, and no person shall employ or permit another person to drive a motor vehicle on the road unless the person so employed or permitted to drive is the holder of such a driving licence.
>
> (2) Any person who contravenes subsection (1) shall be guilty of an offence and shall on conviction be liable to a fine of not less than three hundred ringgit and not more than two thousand ringgit or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.

[10] The defendant submitted that since it was undisputed that the first plaintiff had contravened s 26 of the Road Transport Act 1987, he had, therefore, contributed to the negligence, and as such, had not come to court with clean hands. The defendant further contended that as a result thereof, only minimal damages should be awarded.

[11] I was unable to agree with the defendant's contention in view of the fact that liability had already been conceded, and that the trial had proceeded for assessment of damages. The issue of liability was, therefore, irrelevant and as such contributory negligence, if at all, had no bearing on the assessment of damages.

[12] Secondly, it was undisputed that it was the defendant's negligence, and not the first plaintiff's fall from his motorcycle, that had caused both amputations, an event which had no proximity or causal connection to the first plaintiff's illegal act of riding the motorcycle without a licence.

[13] However, having said that, it should be underscored that this court is not condoning the illegal act of the first plaintiff. Although what had happened to the first plaintiff was most unfortunate, it is also a sobering reminder to parents of their responsibility to monitor their children's activities. Furthermore, this was a case where the first plaintiff must have known that his act was illegal but nevertheless, chose to embark on an activity that was clearly against the law.

[14] In the final analysis, although it was my view that the maxim *ex turpi causa non oritur actio* (no action can be based on a disreputable cause), which the defendant had relied on, did not apply to the assessment of damages in this case, it was also my opinion that whatever award granted to the plaintiffs must be reasonable and not excessive.

Pain and suffering, and loss of amenities

[15] The plaintiffs' claim for pain and suffering, and loss of amenities was for a total sum of RM190,000.

[16] The principles governing damages for pain and suffering and loss of amenities are found in the Federal Court case of *Yeo Kim Kuan v Hamid* [1968] 2 MLJ 188; [1968] 1 LNS 177, where it was stated by Macintyre FJ:

> In his dissenting judgment in *West v Shepherd*, Lord Devlin says:
>
> > There are two ways in which the loss of enjoyment can be considered. It can be said that from beginning to end it is really all mental suffering ... If this is the true view then total unconsciousness as in *Wise v Kaye and Anor*, relieves all mental suffering and nothing can be recovered for a deprivation which is not being experienced.
> >
> > The other way to look upon the deprivation of a limb is a loss of a personal assets, something in the nature of a property. A limb can be put both to a profitable use and to a pleasurable use. In so far as it is put to a profitable use, the loss is compensated for by calculating loss of earnings and not by assessing mental pain.

A On the same principle, it can be said, a sum must be assessed for loss of pleasurable use irrespective of whether there is mental suffering or not.

[17] Although in principle an amount must be assessed for loss of the first plaintiff's use of his limb, in reality, no sum can ever be adequate to compensate a person for the intangible loss of his limb, particularly so in this case where the first plaintiff was just over 12 years old when he had undergone the amputations.

[18] This was made very clear by Raja Azlan Shah J (as he then was) in *Raja Mokhtar bin Raja Yaacob v Public Trustee, Malaysia* [1970] 2 MLJ 151, in the following passage:

> Any compensation for loss of amenities and pain and suffering must be artificial. No sum can be adequate. But the court must give an award which would represent artificially the gravity of the loss and the severity of the pain and suffering. It is hard to give cogent reasons for this figure or for that.

[19] I also found instructive the case of *Teoh Suan Eng v Lew Meng Shin* [1982] 2 MLJ 289, where it was stated by VC George J:

> In a case like the present the plaintiff's real loss is not so much his physical injury as the loss of those opportunity to lead a full and normal life which are now denied to him by his physical condition and for what he will suffer from being unable to do so. *There are two elements involved what he had lost and what he must feel about it and of the two the latter is generally the more important to the injured man*. For every day of his life he is acutely conscious of what he has suffered and what he had lost. He must therefore be compensated, as far as money can do it, for that and for the mental strain and anxiety which results. (Emphasis added.)

[20] I, therefore, found untenable the defendant's submission for an amount of only RM135,000 to be awarded, bearing in mind that as the first plaintiff had undergone two amputations in less than two weeks, it is undeniable that he would have suffered excruciating pain. Although it has been said that compensation for pain and suffering and loss of amenities is an artificial representation of the gravity of the same, comparable awards may be found in several cases such as *Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors* [2019] 8 MLJ 331; [2019] 1 CLJ 626, and *Uthayakumar a/l M Subramaniam v Ang Teng Bee* [2017] 8 MLJ 750; [2016] 1 LNS 1214.

[21] I was of the view that an award of RM190,000 was, therefore, reasonable and just.

AGGRAVATED DAMAGES

[22] The plaintiffs had sought a sum of RM1m as aggravated damages on the basis that the defendant's conduct was accompanied by arrogance, spite, malice, insult and had, therefore, aggravated and heightened the sense of injury to the first plaintiff.

[23] The concept of aggravated damages was explained by Lord Diplock in *Cassell & Co Ltd v Broome* [1972] AC 1027 as 'compensation for the injured feelings of the plaintiff, where the sense of injury resulting from wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it'. This definition has been approved and adopted by several Malaysian cases including *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337 and *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500, where in the latter case, it was stated by Mohd Zawawi Salleh JCA (now FCJ):

> ... aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interest of personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant.

[24] The authorities are indicative that whatever hurt, pain or insult that a plaintiff suffers is predicated on the contumelious behaviour and conduct of the defendant.

[25] In claiming for aggravated damages, the plaintiffs relied on the cases of *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 3 CLJ 427, and *Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors* [2019] 8 MLJ 331; [2019] 1 CLJ 626

[26] Bearing in mind that the plaintiffs had the legal burden to prove their claim on a balance of probabilities, in my view, their submission is unsubstantiated as there was no proof of such contumelious conduct on the part of the defendant, as alleged. Secondly, the cases that the plaintiffs had relied upon are distinguishable, in that, in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal*, the basis of awarding aggravated damages was the defendant's conduct in failing to inform the plaintiff of the potential risks of eye surgery, whilst in *Dato' Stanley Isaacs (suing by himself and as the administrator of the estate of To' Puan Suzanne Thomas, deceased) v The Government of Malaysia & Ors*, it was the defendant's conduct in making an inaccurate diagnosis of the deceased's condition that had formed

the basis of awarding aggravated damages.

[27] In this case, based on the evidence given by the plaintiffs themselves, it is my finding that they had been informed of the surgeries to be performed on the first plaintiff, and the risks that ensued. The defendant conceded that if at all aggravated damages were to be awarded, following the case of *Pyu Pyu Ma v Dr Lim Soo How & Ors* [2019] 11 MLJ 628, it should be RM75,000, for failing to comply with the guidelines prescribed by the hospital. Although I disagreed with the award of RM1m as aggravated damages on the basis that it was excessive, I had also disagreed with the defendant's justification for an award of only RM75,000. In the final analysis, although I take cognisance of the injured feelings of the first plaintiff, after perusing the notes of the evidence, I found that the conduct of the defendant which supposedly caused the injured feelings of the first plaintiff was not such as to warrant the award of RM1m for aggravated damages. An award of RM150,000 instead was granted on the basis that it was a reasonable and fair amount.

Cost of the prosthesis

[28] On the cost of the prosthesis, the plaintiffs' contention gave rise to the following issues:

(a) whether the witnesses called by both the plaintiffs and defendant were 'persons specially skilled' within the definition of s 45 of the Evidence Act 1950 ('the Evidence Act');

(b) whether this court had descended into the arena of dispute in putting questions to the plaintiffs' expert witness ('SP5'), to determine the cost that should be awarded for the prosthesis; and

(c) whether art 8 of the Federal Constitution was applicable to prevent this court from taking into account the plaintiffs' financial situation in determining the cost that should be awarded for the prosthesis.

Whether the witnesses called by both the plaintiffs and defendant were 'persons specially skilled'

[29] The plaintiffs argued that the defendant's witness, Dr Tan Jin Hui, a rehabilitation physician ('SD1'), was not registered under the National Specialist Register ('NSR') of the Malaysian Medical Council and, therefore, could not hold himself out as an expert to give evidence on the suitability and cost of a prosthesis for the first plaintiff.

[30] The defendant, on the other hand, argued that the witness called by the plaintiffs, Choong Yuen Hui, a clinical prosthetist and orthotist ('SP5'), was

nothing more than a 'penjual kaki palsu', who was neither qualified, nor experienced to give opinion evidence on what prosthesis would be apt for the first plaintiff.

[31] I found the arguments of both parties untenable, and at this juncture, it is vital to address the issue of who an expert is, to begin with. In s 45 of the Evidence Act 1950, an expert is referred to as a 'person specially skilled'. The section reads:

> Section 45 — Opinions of experts
>
> (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of *persons specially skilled* in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> (2) Such persons are called experts. (Emphasis added.)

[32] A 'person specially skilled' was described by Lord President Suffian in *Public Prosecutor v Muhamed bin Sulaiman* [1982] 2 MLJ 320, as follows:

> It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he adequate knowledge?
>
> *Phipson on Evidence* (11th Ed), states in para 1285:
>
> > The competency of the expert is a preliminary question for the judge and is one upon which, in practice, considerable laxity prevails. *Though the expert must be 'skilled', by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to admissibility*. (Emphasis added.)

[33] I also found instructive the case of *Public Prosecutor v Saad bin Mat Takraw & Anor* [1998] 3 MLJ 784; [1998] 3 CLJ 380, where it was stated by Vincent Ng J:

> Whereas the chemist here was called as an expert witness under s 45 of the Evidence Act, through evidence being led to establish his expertise. *That being so, it matters not whether he was or was not a 'registered chemist' or 'a person authorised under s 23A of the Chemist Act 1975'*. He was a competent witness for the purposes of the instant case. Also, s 23(2) of the Chemists Act applies only to cases where the certification of the chemist relates to 'substance or product *consumed or used by, or intended for the consumption or use of, the public* or any section thereof', which obviously does not include consumption of dangerous drugs. (Emphasis added.)

[34] The plaintiffs' submission that SD1 was not an expert as defined by s 45 of the Evidence Act 1950 was unacceptable. I found likewise untenable the

defendant's contention, as it was an oversimplification to refer to SP5 as a mere 'penjual kaki palsu'. SP5 had obtained a degree in Biomedical Engineering Prosthesis and Orthosis from the University of Malaya and had been employed as a clinical prosthetist and orthotist for six years. He had also informed the court that he had given evidence before, and I was satisfied that the procedure to establish his expertise as an expert witness, prescribed by *Wong Chop Saow v Public Prosecutor* [1965] 1 MLJ 247, and *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441; [2010] 3 CLJ 671, was complied with.

[35] In the final analysis, it is for the trial judge himself as both decider of fact and law to determine the weight to be attached to the evidence of the expert witness, regardless of his qualification or experience (or the lack thereof).

[36] I was more inclined towards the evidence of SP5 due to the details and bases that he had furnished in his report (grounds), as required by s 51 of the Evidence Act which reads:

> Section 51 — Grounds of opinion when relevant
>
> Whenever the opinion of any living person is relevant, the grounds on which his opinion is based are also relevant.

[37] However, my concern was the wide gap between the unprecedented and staggering cost of the prosthesis in the amount of over RM4m, and that prescribed by SD1 in the amount between RM340,000 and RM373,000. SP5 was candid enough to inform the court that, although he had prepared a report and went into a detailed explanation of the components of the prosthesis, he had no knowledge of the pricing of the components of the prosthesis, as that was prepared by the administration department of Endolite Asia Sdn Bhd, that is, the company that employed him.

[38] Questions, therefore, had to be put to SP5, to determine if the inflated figure of the components that he had recommended, was justified.

Whether the court had descended into the arena of the dispute by putting questions to SP5

[39] The plaintiffs in objecting to the fact that I had put questions to SP5, claimed that I had descended into the arena of the dispute, and that an adversarial system of justice prevents the judge from doing so. I was of the view that this argument was unsubstantiated for the following reasons.

[40] In Malaysia, we subscribe to the adversarial legal system, as explained by Zaki Tun Azmi CJ in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293; [2009] 6 CLJ 430:

> The nature of our system is adversarial. This means that the judge has to listen to submissions or cases put by each party to an action. He then decides the case based on evidence and submissions put by both parties. In a criminal case, the prosecution has to prove their case beyond reasonable doubt while the defence's burden is merely to raise a doubt. In civil cases however, the burden placed on both parties is equally balanced. The successful party is the one that is able to prove to the court on the balance of probability that his case is more probable. That is on facts. The claimant has to plead his case in the statement of claim while the defendant pleads in his statement of defence. In short, both parties are aware of the other party's case. In fact, both parties would know the facts but also the documents, if any, that are going to be relied upon by his opposite party.

[41] As a general rule, therefore, the parties, through their counsel, control the course of the proceedings. They decide what evidence is to be adduced, and subject to the rules of evidence and procedure, the court determines the relevancy and admissibility of such evidence. The judge's role is akin to that of a referee.

[42] However, although the adversarial system requires the judge to act as a referee to the dispute, the judge's discretion that must be underscored is found in s 165 of the Evidence Act, which allows him to put questions to any witness or to order the production of any document. The section reads:

> Section 165 — Judge's power to put questions or order production
>
> The judge may, *in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant*; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question ... (Emphasis added.)

[43] At this juncture, reference is made to *Abuchi Ngwoke v Public Prosecutor* [2016] 2 MLJ 623. Although a criminal case, the principles pertaining to s 165 of the Evidence Act were clearly distilled by Kamardin Hashim JCA:

> However, the judge is not obliged to remain silent, and can ask witnesses or counsel questions if (inter alia):
>
> (a) it is necessary to clarify a point or issue that has been overlooked or has been left obscure, or to raise an important issue that has been overlooked by counsel; this is particularly important in criminal cases where the point or issue relates to the right of the accused to fully present his or her defence in relation to the charges concerned;
>
> (b) it enables him or her to follow the points made by counsel;

(c) it is necessary to exclude irrelevancies and/or discourage repetition and/or prevent undue evasion and/or obduracy by the witness concerned (or even by counsel); and

(d) it serves to assist counsel and their clients to be cognisant of what is troubling the judge, provided it is clear that the judge is keeping an open mind and has not prejudged the outcome of the particular issue or issues (and, a fortiori, the result of the case itself).

[44] What I found baffling was the excessive amount that the plaintiffs claimed for the cost of the prosthesis, and to address those concerns, I had recalled SP5 to obtain clarification regarding the components of the prosthesis. I did so because of the wide gap between what SD1 had prescribed and what SP5 had recommended. In light of that, I invoked s 165 of the Evidence Act to question SP5, in order to obtain an explanation for the disparity. Since the expert's role is to assist the court, in my view, I had not descended into the arena of the dispute or aided the defendant's case. SP5 was an expert witness whose role was to assist the court.

[45] On that note, it is vital to understand the role of the expert. Pursuant to O 40A r 2(1) of the Rules of Court 2012 ('the ROC'), the expert's function is to assist the court on the matters within his expertise. The provision reads:

> Order 40A — Experts of parties
>
> Rule 2 — Expert's duty to Court
>
> (1) It is the duty of an expert *to assist the Court* on the matters within his expertise. (Emphasis added.)

[46] I am guided also by the observations of Raja Azlan Shah CJ (as he then was) in *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1980] 1 LNS 138, in the following passage:

> Our system of jurisprudence does not, generally speaking, remit the determination of dispute to experts. Some questions are left to the robust good sense of a jury. Others are resolved by the conventional wisdom of a judge sitting alone. *In the course of elucidating disputed questions, aids in the form of expert opinions are in appropriate cases placed before juries or judges*. But, except on purely scientific issues, expert evidence is to be used by the court for the purpose of assisting rather than compelling the formulation of the ultimate judgments. In the ultimate analysis it is the tribunal of fact, whether it be a judge or jury, which is required to weigh all the evidence and determine the probabilities. It cannot transfer this task to the expert witness, the court must come to its own opinion. (Emphasis added.)

[47] The court is reminded to be vigilant when expert witnesses give evidence, and where one party, for example, fails to put relevant questions, the answers thereto which will help the court arrive at a correct conclusion with

regard to matters relevant to the proceedings, the court has a duty to see that the particulars are elicited. The trial judge has the duty and right to put such questions to the witness, not with a view to help one side or the other, but to assist the court reach a correct and just conclusion, with regard to the matters in dispute.

[48] The amount of compensation awarded must, therefore, be reasonable and just. Reference on this point may be made to *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324, which has been adopted by numerous cases, including *Antonina Marleen Yarendra v Chai Wei Chung* [2017] 4 MLJ 359; [2017] 1 LNS 536. In the former case, it was stated by Syed Agil Barakbhah FJ:

> Damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give reparation for the wrongful act and for all the natural and direct consequences for the wrongful act, so far as money can compensate. *British Transport Commission v Gourley* and *H West & Son Ltd v Shepard* [1963] 2 All ER 625. *The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant* (per Sir Alexander Cockburn LJ in *Phillips v South Western Railway Co* (1879) 4 QBD 406). (Emphasis added.)

[49] I also found instructive the case of *Mohd Tarmizi Mat Hassan & Anor v Arief Fitri Ahmad Zainuddin* [2014] 1 LNS 1005, where on the issue of an award granted by the learned sessions court judge in that case in the amount of RM3.5m, it was stated by Gunalan Muniandy JC (now JCA), that it 'was manifestly excessive, unprecedented and well above the discernible trend for this type of claim without justification on valid and cogent grounds'.

[50] In that sense, the court must remain vigilant so as not to invite, condone and engender abuse in the way of manipulating of claims, which is not what damages are for.

[51] In light of the absence of SP5's knowledge of the pricing of the components of the prosthesis, it was quite natural to expect a quotation from the administration department of Endolite Asia Sdn Bhd to justify the utility, comfort, and even luxury of the prosthesis recommended by SP5. However, it must be borne in mind that SP5 himself ultimately agreed that it was the Endolite Lynx component in the prosthesis that was the root of the inflated figure, as it had cost RM284,753 and was compounded by the frequency of replacing it 12 times throughout 60 years (until the first plaintiff reaches the age of 73). As a result thereof, the amount quoted for the Endolite Lynx component alone was in the total of RM3,417,036. SP5 further agreed that the Endolite Lynx could be replaced with a mechanical component costing RM20,000 (instead of RM284,753) which, although less expensive, would not compromise the quality or functionality of the prosthesis. After perusing the

list of components for the proposed prosthesis, SP5 had agreed that the figure could be reduced to RM581,000, which I had rounded up to RM600,000, and which in my view, was just and reasonable.

Whether art 8 of the Federal Constitution was applicable

[52] The plaintiffs further argued that the reason for reducing the cost of the award for the prosthesis was because I had in mind the plaintiffs' financial position, and in relying on *Joginder Singh a/l Ajaib Singh & Ors lwn Leong Sai Feng & Anor* [2019] MLJU 1427; [2019] 1 LNS 1689, the plaintiffs contended that art 8 of the Federal Constitution applied to prevent the court from considering a person's financial situation as a factor in awarding prosthesis cost.

[53] I am unable to agree with this contention in view of the fact that first and foremost, in *Joginder Singh a/l Ajaib Singh & Ors lwn Leong Sai Feng & Anor* itself, on appeal, the High Court awarded RM1m for the cost of the prosthesis, which was nowhere near the amount of over RM4m that the plaintiffs claimed in this case. Secondly, it was the plaintiffs' own witness, SP5 who had testified that he would have reduced the pricing of the prosthesis if he knew of the plaintiffs' financial background. It was inequitable, therefore, for the plaintiffs to now contend that it was the court which had considered the financial factor. Thirdly, the financial situation was merely put hypothetically to SP5 for him to understand my intention of finding a reasonable cost for the prosthesis. If the plaintiffs' financial position was in fact the basis of my award for the cost of the prosthesis, I would have accepted instead, the cost of the prosthesis prescribed by SD1, and left it at that. Fourthly, I had emphatically stated that the reason for recalling the plaintiffs' expert was to clarify the basis of the disparity between the cost of the prosthesis of RM340,000 recommended by SD1, as opposed to the one recommended by SP5 at the cost of slightly over RM4m. This is evident from the following paragraphs of the notes of evidence:

JC : Okay Mr Cheong, earlier this is what you said: you said if the amputee is having financial problems and is unable to afford the price of this prosthesis then you will balance it out?

SP5 : Yes, we will try to change the component or something.

JC : So tell me what happens if that hypothetical situation is a reality and now the amputee says I am unable to afford this because you have only give one quotation. I don't have any alternative and it is over RM4m but the defendant's expert is prescribing something which is less than RM400,000. There's a huge gap you know so assuming I come to you and I tell you I cannot afford this what changes can you do?

SP5 : So in reality if let's say you come to me and then after I prescribe this leg and then you say you cannot afford and then normally what I will ask is how much you can afford.

...

JC : Because counsel, I ask these questions because the gap is too big so I cannot be put in a position where I choose one or the other, then it will not be fair to either.

(JC = Judicial Commissioner)

(Emphasis added.)

[54] It was also my view that the plaintiffs' reliance on art 8 of the Federal Constitution in this situation is misconceived. I had already alluded to the fact that the plaintiffs were not discriminated on the basis of their financial position, but I am compelled to address the issue of art 8 of the Federal Constitution, which was put very aptly by the Federal Court in the case of *Beatrice a/p AT Fernandez v Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681; [2005] 2 CLJ 713:

> The equal protection in clause (1) of article 8 thereof extends only to persons in the same class. It recognises that all persons by nature, attainment, circumstances and the varying needs of difference classes of persons often require separate treatment.

[55] I also found instructive the Federal Court cases of *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166; [1976]1 LNS 100, and *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155; [1976] 1 LNS 19, where in the latter case it was stated by Lord President Tun Suffian:

> The principle underlying art 8 is that a law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstances, nor that it 'must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons ... for the purpose of legislation', *Kedar Nath v State of West Bengal* AIR 1953 SC 404 406.
>
> In my opinion, the law may classify persons into children, juveniles and adults ... the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; ... *All that art 8 guarantees is that a person in one class should be treated the same as another person in the same class*, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on. (Emphasis added.)

[56] In that case, it was said that discrimination is allowed if it was made on 'reasonable' or 'permissible' classification, provided that: (a) the classification is founded on an intelligible differentia which distinguished persons that are

grouped together from others left out of the group; and that (b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question. In fact, in *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241, it was explained by Malek Ahmad JCA, that 'that nexus may be based on sociological or economic or cultural considerations.'

[57] The principle of reasonable classification was also adopted in several cases including *Malaysian Bar v Government of Malaysia* [1987] CLJ Rep 185.

[58] The plaintiffs took the position that the first plaintiff was entitled to the best prosthesis that money could buy. First and foremost, prosthetic use is not for everyone and all amputees cannot be painted with the same brush. One amputee differs from another, and relevant considerations must be taken into account such as the amputee's goals, his mental physical and emotional wellbeing, his activities and dependency on external assistance to conduct such activities. For example, an amputee whose goal is to embark in competitive sports would surely be considered in a different light from an amputee who leads a sedentary lifestyle. Furthermore, any prosthesis, cheap or expensive, would take some getting used to, and courts should generally be sceptical of the evidence of a party selling an expensive prosthesis, lest it amounts to nothing more than a sales pitch of a person with a vested interest.

[59] Be that as it may, the court must strike a balance between what is reasonably suitable for the first plaintiff, without rendering the defendant impecunious, and based on such circumstances, an award of RM600,000 for the cost of the prosthesis for the first plaintiff was what I had considered reasonable and fair.

Cost of care/ house-help

[60] The plaintiffs claimed for cost of care in the amount of RM1,500 per month for 60 months until the first plaintiff reached the age of 18, making it a total amount of RM90,000.

[61] The value of care provided to a disabled person by family members has always been recognised, as stated in *Tan Cheong Poh & Anor v Teoh Ah Keow* [1995] 3 MLJ 89; [1996] 3 CLJ 665:

No doubt the plaintiff's mother has been providing her services free of charge to her handicapped daughter but the courts have always compensated plaintiffs for the true value of the services that the plaintiff needs even though it is provided by a parent or other relative.

[62] However, there were two aspects of the plaintiffs' claim for cost of care that I disagreed with. The first is the duration of the time that the first plaintiff would require the care. The first plaintiff was already awarded RM600,000 for the cost of the prosthesis, and it was, therefore, inequitable to claim for cost of care until the age of 18, as that would be akin to having his proverbial cake and eating it. However, I acknowledged the fact that the first plaintiff may need some assistance during the initial stages of using the prosthesis. I, therefore, awarded the cost of care for 23 months pre-trial (that is from the date of the accident on July 2018, to June 2020); and another 24 months from the date of this decision on 30 June 2020 — amounting to a total of 47 months.

[63] The other aspect of the plaintiffs' claim which I had disagreed was the monthly amount factored into the cost of care. In my view, RM1,500 was too high and a monthly sum of RM500 was therefore awarded, which in my view was reasonable, fair and in accordance with other comparable cases, such as *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1; [2016]2 CLJ 885. This would amount to a total sum of RM23,500.

Cost of proceedings

[64] The plaintiffs had claimed for RM150,000 for the cost of proceedings. The defendant's submitted that RM7,000 was sufficient, bearing in mind that it was only the issue of quantum upon which arguments and submissions were based. In my view, RM7,000 was an extremely low figure. The trial had proceeded for five days (although not full days), and although the defendants had conceded to liability, they had done so midway during the trial. I, therefore, took that view that RM70,000 was a fair and reasonable figure for the cost of the proceedings.

Cost of other items

[65] Cost of the discovery application for the medical report — This item was not allowed, as it was my view that there was no reference or production of the order of the court to this effect and secondly, the cost of proceedings in the amount of RM70,000 had already been awarded to the plaintiffs.

[66] Cost of future travel — This item was not allowed as it was not proved as prescribed by the Federal Court in *Ong Ah Long v Dr S Underwood* [1983]

2 MLJ 324. To draw from the passage of Lord Goddard in the case of *Bonham-Carter v Hyde Park Hotel, Ltd* [1948] 64 TLR 177 which was cited in several Malaysian cases including *Sum Kum v Devaki Nair & Anor* [1964] 1 MLJ 74; [1963] 1 LNS 131:

> plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages'. They have to prove it.

[67] In any event, I had allowed cost of the prosthesis in the amount of RM600,000, which was more than RM581,000, as prescribed by SP5. It was, therefore, inequitable for the plaintiffs to also claim for of future travel.

[68] Court attendance of expert witness (Dr Dhillon) — The plaintiffs submitted an amount of RM10,000. Although the hearing had not proceeded as scheduled on that particular day, I decided on an award of RM4,000 for the travel expense of Dr Dhillon. The defendant contended that no cost whatsoever should be awarded for this item but I took note that the hearing did not proceed as scheduled because it was the defendant which had requested for a last minute adjournment. In my view, the amount of RM4,000 was a fair amount as the plaintiffs could not justify the sum of RM10,000.

[69] Court attendance of SP6 (Ryaliratna Manjari) — The plaintiffs submitted an amount of RM4,500. I decided on an award of RM2,500 only since the plaintiffs had withdrawn the claim for any relief relating to psychiatric harm or injury.

CONCLUSION

[70] In the upshot, based on the aforesaid reasons, and after careful scrutiny of all the evidence before this court, both oral and documentary, and submissions of counsel for both parties, the following items in diagram A below, were awarded to the plaintiffs.

[71] The plaintiffs are now appealing to the Court of Appeal against the decision of this court for the awards for items in the shaded rows, as well as items for awards not granted such as: (a) cost for travelling in future for repair and maintenance of the prosthesis, and (b) court attendance of SP5. It is pertinent to note that the plaintiffs had not submitted on the cost of the court attendance for SP5. Although parties were asked repeatedly during clarification if they had any other items to address, there was no submission on this issue whatsoever. It is, therefore, inequitable for the plaintiffs to now appeal on the basis that the cost for the court attendance of SP5 was not granted.

Table A

No	Item	Amount (in RM) awarded the court
1	Pain and suffering and loss of amenities	190,000
2	Aggravated damages	150,000
3	Cost of prosthesis	600,000
4	Cost of care/house-help	23,500 (RM500 x 47 months)
6	Medical reports	200 + 118
8	Orthopedic's report	3,000
9	Specialist's report from Ramachandran Orthopedic Surgery Sdn Bhd	790
10	Specialist's report from Gleneagles Medini	510
11	SP5's Prosthetic Report (Endolite (Asia) Sdn Bhd)	5,000
12	Court attendance for Dr Dhillon	Only 4,000 allowed
13	Court attendance for Ms Ryaliratna	Only 2,500 allowed
16	Cost for proceedings	70,000
17	Interest	General and aggravated damages (8% from the date of amputation until the date of the judgment) Special damages 4% per year from 26 June 2019 until date of this judgment 5% on judgment sum including costs from the date of the judgment until date first plaintiff received judgment sum.

Order accordingly.

Reported by Nuzul Fitrie